NOT INTENDED FOR PUBLICATION
UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN THE MATTER OF:	:	**CASE NUMBERS**
	:	
YONGCHUL CHOI,	:	BANKRUPTCY CASE
	:	NO. 04-90252-WHD
Debtor.	:	
_____	:	
	:	
DEBORAH CHOI,	:	
	:	
Plaintiff,	:	ADVERSARY PROCEEDING
	:	NO. 04-6048
v.	:	
	:	
YONGCHUL CHOI,	:	
	:	IN PROCEEDINGS UNDER
	:	CHAPTER 7 OF THE
Defendant.	:	BANKRUPTCY CODE

O R D E R

Currently before the Court is the Motion for Summary Judgment filed by Yongchul Choi (hereinafter the "Debtor") against Deborah Choi (hereinafter the "Creditor"). This matter arises in connection with a complaint filed by the Creditor, in which she seeks a declaration that certain divorce-related obligations owed her by the Debtor are nondischargeable under § 523(a)(5) and (15) of the Bankruptcy Code. The Creditor has filed a response to the Debtor's Motion, to which the Debtor has filed a reply brief. This matter falls within the subject matter jurisdiction of the Court. *See* 28 U.S.C. §§ 157(b)(2)(I); 1334.

FINDINGS OF FACT

The Creditor and the Debtor were married in December 1992 and divorced by entry of a final decree in the Superior Court of Gwinnett County, Georgia on or about May 20, 2003. Debtor's Statement of Undisputed Material Facts (hereinafter "Debtor's Statement of Facts"), ¶ 2; Creditor's Statement of Material Facts in Dispute (hereinafter "Creditor's Statement of Facts"), ¶¶ 1-2. Prior to entry of the divorce decree, the parties executed a Settlement Agreement.[1] The Debtor and the Creditor had no children. Debtor's Statement of Facts, ¶ 1.[2] The Debtor has an undergraduate degree in biology and a master's degree in divinity and briefly attended medical school. *Id*. ¶ 36. The Creditor has an undergraduate degree in English Literature and a master's degree in divinity. *Id*. ¶ 37. During their marriage, the Debtor and the Creditor were ministers for Atlanta New Hope Church, a southern Baptist church. *Id*. ¶ 38. Throughout that time, the Debtor and the Creditor never earned more than $7,500 in annual income. *Id*. ¶ 39. Prior to June 2001, the parties lived in rental housing. *Id*. ¶ 44. In 2001, the parties moved into a home purchased in their name with the assistance of the Debtor's parents, who paid approximately $75,000 towards the down payment on the home. *Id*. ¶¶ 40-42. The church committed $500 towards the parties'

[1] The Settlement Agreement was incorporated into the final divorce decree, and the terms of the parties' settlement were announced on the record before Judge Hamil on May 20, 2003. *See* Transcript of Hearing Before the Hon. Timothy R. Hamil, Superior Court for the County of Gwinnett, May 20, 2003.

[2] The Creditor has not specifically controverted certain of the Debtor's statements of material fact. Pursuant to BLR 7056-1(b)(2), the Court must deem these facts to be admitted.

monthly mortgage payments. *Id*. ¶ 41. When the parties moved into the home, they lived in the basement of the home and rented the first and second stories to tenants. *Id*. ¶ 44.

Pursuant to the Settlement Agreement, the parties were to sell the marital home, with the Creditor being allowed to reside in the home until the time of the sale. Final Judgment and Decree, § 4. The Debtor was required to pay the mortgage, taxes, and insurance on the home, in the amount of $1849 per month, until the home could be sold. *Id*. The Debtor was also directed to make monthly payments of $750 to the Creditor, which were not to begin until the Creditor was required to move from the marital home. *Id*. The proceeds from the sale of the martial home were to be divided equally between the parties, with the exception of an adjustment to be made in the Debtor's favor in the amount of $800 for every month in which he paid the mortgage payment on the home. *Id*. The parties were to each pay one-half of the utility bills for the home, so long as the Debtor continued to reside in the basement of the home, and thereafter, the Creditor was to pay all utility bills. *Id*. The Debtor received as his separate property his business, known as "Brake Service." *Id*. § 8. The Creditor received as her separate property the Toyota Tercel vehicle, which the Debtor was directed to return to the Creditor after placing it in "good running condition," and a 2000 Daewoo vehicle. *Id*. § 9. Both parties were directed to pay their own attorney's fees and costs. *Id*. § 11.

Additionally, two provisions of the of the Settlement Agreement are applicable to the present controversy. First, section 5 of said agreement states that:

> [Debtor] shall pay and save Plaintiff harmless on $35,000 in debt which he has charged on her charge cards and make a good faith effort to have all the

> money transferred to his account and shall otherwise satisfy the obligation before May 20, 2006; this shall be considered support to [Creditor] from [Debtor] but shall not be taxable income to her.

Settlement Agreement at § 5. Second, section 6 states that:

> [Creditor] and [Debtor] are joint obligors on a note to [Creditor's] mother, Choonja Seo, and judgment is granted to [Creditor] and her mother in said sum of $22,000 plus 6% percent [sic] interest from the date of the closing of the sale of said home. [Debtor] shall be allowed to retire the same at the rate of $600 per month, the first of such payments to be paid on the 1st day of the month following the closing of the sale of said home. This shall not be taxable income to [Creditor].

Settlement Agreement at § 6.

At the time of the parties' divorce, the Creditor was employed by CBM, Inc. and was earning gross monthly income of $2,700, with net pay of around $2,000. Debtor's Statement of Fact, ¶ 31. At that same time, the Debtor was earning no income and was sustaining a net operating loss from his business, Brake Service. *Id*. ¶ 32. When the parties entered the Settlement Agreement, the parties anticipated that the Debtor would be solely responsible for paying the mortgage on the marital residence. *Id*. ¶ 33. The Debtor was also liable for monthly payments that totaled approximately $4,500 for credit card debt, including the debt for the credit cards in the Creditor's name, as well as payments of $300 for a home equity line of credit on the marital residence and $400 for an equity line of credit taken on his father's home. *Id*. ¶¶ 33-34.

On January 7, 2004, the Debtor filed a voluntary petition under Chapter 7 of the Bankruptcy Code. On February 17, 2004, the Creditor filed her complaint seeking a determination that the Debtor's obligation to pay for the repairs on her vehicle, his obligation

to pay the note owed to the Creditor's mother, and his obligation to pay the $35,000 of unsecured credit card debt were all nondischargeable pursuant to either § 523(a)(5) or § 523(a)(15).

The Debtor filed the instant motion for summary judgment in which he requests a determination that, as a matter of law, all three debts are dischargeable. The Creditor has responded and argues that questions of fact remain that must be determined before the Court can reach a conclusion as to the dischargeability of these debts.

CONCLUSIONS OF LAW

A. *Summary Judgment Standard*

In accordance with Federal Rule of Civil Procedure 56 (applicable to bankruptcy under FED. R. BANKR. P. 7056), this Court will grant summary judgment only if "there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law." FED. R. CIV. P. 56(c). A fact is material if it might affect the outcome of a proceeding under the governing substantive law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A dispute of fact is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id*. The moving party has the burden of establishing the right of summary judgment, *Clark v. Coats & Clark, Inc.*, 929 F.2d 604, 608 (11th Cir. 1991); *Clark v. Union Mut. Life Ins. Co.*, 692 F.2d 1370, 1372 (11th Cir. 1982), and the Court will read the opposing party's pleadings liberally. *Anderson*, 477 U.S. at 249.

In determining whether a genuine issue of material fact exists, the Court must view the evidence in the light most favorable to the nonmoving party. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970); *Rosen v. Biscayne Yacht & Country Club, Inc.*, 766 F.2d 482, 484 (11th Cir. 1985). The moving party must identify those evidentiary materials listed in Rule 56(c) that establish the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986); *see also* FED. R. CIV. P. 56(e). Once the moving party makes a prima facie showing that he is entitled to judgment as a matter of law, the nonmoving party must go beyond the pleadings and demonstrate that there is a material issue of fact which precludes summary judgment. *Celotex*, 477 U.S. at 324; *Martin v. Commercial Union Ins. Co.*, 935 F.2d 235, 238 (11th Cir. 1991).

In his reply brief, the Debtor urges the Court to disregard the Creditor's response on the basis that it was untimely filed. As the Debtor points out, this Court *may* decline to consider a response filed after the deadline established by BLR 7007-1(b). *See* BLR 7007-1(f). The Court does not choose to disregard the Creditor's response in this instance. Further, even if the Court were to disregard the Creditor's response and deem the motion to be unopposed, the Court would not necessarily grant the Debtor's Motion. *See Mendez v. Banco Popular De Puerto Rico*, 900 F.2d 4, 7 (1st Cir. 1990) ("Whether or not opposed, summary judgment can only be granted 'if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.'") (citations omitted). The Court can grant summary judgment only after

it determines that the record provides a sufficient legal basis which would entitle the Debtor to a judgment as a matter of law. *Dunlap v. Transamerica Occidental Life Ins. Co.*, 858 F.2d 629, 632 (11th Cir. 1988); *Kelly v. United States*, 924 F.2d 355, 358 (1st Cir. 1991).

B. *Section 523(a)(5)*

In order for a debt to be nondischargeable under § 523(a)(5), the creditor must establish that: 1) the debt at issue is owed to a "'spouse, former spouse, or child'" of the debtor; 2) the debt is "'actually in the nature of' (as opposed to simply designated as) alimony, maintenance, or support"; and 3) the debt was incurred "'in connection with a separation agreement, divorce decree or other order of a court of record.'" *In re Maddigan*, 312 F.3d 589 (2d Cir. 2002) (citing 11 U.S.C. § 523(a)(5)). In this case, the parties do not dispute the fact that the three debts at issue constitute debts owed to a former spouse of the Debtor[3] or that the debt was incurred in connection with the parties' divorce decree. Accordingly, the Court need only determine whether the debts are "actually in the nature of support."

The question of whether a debt constitutes "support," within the meaning of § 523(a)(5), is a question of federal law. *In re Strickland*, 90 F.3d 444 (11th Cir. 1996). "Thus, a label placed upon the obligation by the consent agreement or court order which

[3] The fact that the payee of two of these obligations are third parties is irrelevant to this issue. *See In re Maddigan*, 312 F.3d at 593 ("The fact that the debt is payable to a third party . . . does not prevent classification of that debt as being owed to [the debtor's] child.").

created it will not determine its subsequent dischargeability in bankruptcy." *In re Robinson*, 193 B.R. 367, 372 (Bankr. N.D. Ga. 1996) (Drake, J.). Instead the Court "should undertake 'a simple inquiry as to whether the obligation can legitimately be characterized as support, that is, whether it is in the *nature* of support.'" *Cummings v. Cummings*, 244 F.3d 1263, 1265 (11th Cir. 2001) (citing *In re Harrell*, 754 F.2d 902, 904 (11th Cir. 1985)). "A debt is in the nature of support or alimony if at the time of its creation the parties intended the obligation to function as support or alimony." *Id*. If the evidence suggests that the parties agreed to impose an obligation upon the debtor as a means of providing support for the former spouse, the Court should find that the obligation is in the nature of support. On the other hand, if the evidence suggests that the parties were attempting to divide the marital property or liabilities, the Court should find that the obligation is not in the nature of support.

In determining the intent of the parties, it is helpful for the Court to consider such factors as: 1) whether the obligation is tied to a contingency, such as death or remarriage of the former spouse; 2) whether the obligation appears to have been imposed as a means of balancing the disparate incomes of the parties; 3) whether the obligation is payable in a lump sum or in installments; 4) the respective physical health of the spouses and their work experience and levels of education; 5) whether additional amounts of "alimony" were awarded; 6) the length of the marriage; 7) whether there was an actual need for support at the time of the divorce; 8) the number and age of children; and 9) the standard of living during the marriage. *Id.; In re Horner*, 222 B.R. 918, 922 (Bankr. S.D. Fla. 1998). The

burden of proof on the issue of whether a debt is nondischargeable under § 523(a)(5) rests with the creditor, and, "[a]s with all exceptions to discharge, . . . courts make a custom of construing section 523(a)(5) narrowly." *In re Bell*, 189 B.R. 543, 547 (Bankr. N.D. Ga. 1995) (Drake, J.).

1. *The $35,000 of Credit Card Debt and the $22,000 Note*

According to the Debtor, the facts relevant to the inquiry with regard to his obligation to pay the credit card debt and the debt to the Creditor's mother are as follows: 1) at the time of the entry of the Settlement Agreement, the Creditor had net income of around $2,000; 2) the Settlement Agreement provided for a separate award of alimony to the Creditor in the amount of $750 per month, which the Debtor does not dispute was intended by the parties to be support; 3) at the time of the entry of the Settlement Agreement, the Debtor had no income and a net operating loss from his business of approximately $2,000 per month; 4) the Settlement Agreement required the Debtor to make the mortgage payments of $1,839 per month; and 5) at the time of the entry of the Settlement Agreement, the Debtor was insolvent, with approximately $150,000 of unsecured debt, including the $35,000 of debt assumed pursuant to the terms of the Settlement Agreement. The Debtor argues that all of these undisputed facts support the conclusion that the parties did not intend the debt assumption as a means of providing additional support to the Creditor.

The Court is inclined to agree with the Debtor that, under the circumstances in existence at the time the parties entered the settlement agreement, the Debtor's assumption of the credit card debts was simply a means of dividing the marital property and liabilities.

Both parties agree that the Debtor incurred these debts in the name of the Creditor. The Creditor contends that she was not even aware that the Debtor was doing so. Accordingly, it was logical for the parties to allocate all of the liability for these debts with the Debtor as an equitable means of dividing the marital obligations, without necessarily intending that the payment of these debts would be required to provide additional support to the Creditor.

Further, the undisputed facts show that the Debtor and the Creditor were in the same financial situation at the time they divorced. Both had graduate level educations, which neither of them could use for employment due to the fact that they had divorced and their ministry opposes divorce. It appears that the Creditor found gainful employment prior to the entry of the Settlement Agreement, while the Debtor was unable to do so. While the Court has no evidence as to the nature of the Creditor's expenses at the time she entered the Settlement Agreement, it has been established that she was not required to make the mortgage payment on her residence at that time. The undisputed facts also show that the Debtor had financial obligations that greatly exceeded his income. The parties had no children and did not have an extravagant lifestyle during their marriage for which the Creditor would require a large amount of support to maintain. Finally, the Settlement Agreement separately provided for the Debtor to pay $750 per month in alimony for a period of three years, which appears to the Court to be a sufficient amount of alimony under the circumstances of the parties' marriage. All of these factors support the Debtor's contention that the obligation to assume the credit card debts and the debt owed to the Creditor's mother were intended to be a division of liabilities.

That being said, the Creditor has submitted her affidavit in which she states that the parties intended to include this provision as a means of providing her with additional support. The Court is also hesitant to dispose of this issue at this stage in these proceedings because of the wording of the Settlement Agreement itself. The Settlement Agreement provides that both the assumption of the credit card debt and the payment of the note owed to the Creditor's mother would be considered support to the Creditor. Notably, the parties also agreed that the amounts paid would not be considered as taxable income to the Creditor. This fact supports the Debtor's contention that the parties did not consider the payment of these debts as support. *See In re Horner*, 222 B.R. 918 (S.D. Ga. 1998) ("[T]ax treatment of the payments is considered highly probative in deciding whether the payments were intended as support or as a division of property."); *see also In re Sternberg,* 85 F.3d 1400, 1405 (9th Cir.1996), *overruled on other grounds, In re Bammer,* 131 F.3d 788 (9th Cir.1997) (providing that payments to spouse will not be treated as taxable income may be evidence that the parties did not intend to create a support obligation, but it is not dispositive of this issue); *In re Smith,* 263 B.R. 910 (Bankr. M.D. Fla. 2001). Nonetheless, the Court must find that a question of fact remains as to the parties' subjective intent in imposing these obligations upon the Debtor. Further, the Court would benefit from an opportunity to consider the testimony and credibility of the parties at trial.[4]

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[4] Because the Court has not yet determined whether the two debt assumption obligations are nondischargeable pursuant to § 523(a)(5), the Court will not conduct a § 523(a)(15) analysis of these obligations at this time. If the Court determines that the obligations were intended to be support, a determination under § 523(a)(15) will be unnecessary. Additionally, in her response to the Debtor's motion for summary judgment,

2. *The 1991 Tercel*

As to the Debtor's obligation to return the Debtor's vehicle in good running condition, the parties appear to dispute, in the first instance, whether the Debtor has satisfied this obligation. Recognizing that a determination on whether the debt itself exists would require the Court to make additional findings of fact that remain in dispute, the Debtor does not seek summary judgment on the basis that he has performed this obligation. Accordingly, the Court will consider only whether there remain in dispute any genuine issues of fact as to whether the parties intended to impose this obligation as a means of support for the Creditor.

The Debtor contends that the undisputed facts mandate a finding that the debt is not in the nature of support. First, the Debtor argues that the fact that, at the time the parties entered the settlement agreement, the Creditor owned a second vehicle, a 2000 Daewoo, which she used as her primary mode of transportation, supports a finding that the Creditor did not need the 1991 Tercel returned to her in running condition in order to support herself. Instead, the Debtor contends that this provision was included in the Settlement Agreement merely because the Debtor happened to own a vehicle repair shop and could afford to do the repair work at cost. In essence, the Debtor suggests that he offered to do this as a courtesy, rather than as a means of providing additional support to the Creditor. In response, the Creditor does not dispute the fact she owned a second vehicle at the time, which she used

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the Creditor argues that the Debtor's obligation to pay the credit card debt is also nondischargeable under § 523(a)(2)(A) on the basis that the Debtor incurred these debts in her name through fraud. The Court notes that these allegations were not made in the Creditor's complaint, and the complaint has never been amended.

to drive herself to work, and has pointed to no evidence in the record to controvert the Debtor's arguments. As noted above, the parties' relatively similar financial situations at the time they entered the Settlement Agreement, as well as the fact that the Creditor was separately entitled to a $750 per month alimony payment, support a finding that the repair obligation was not necessary for the Creditor's support and was not intended by the parties to be support. Additionally, the Court notes that there is nothing within the Settlement Agreement itself or the transcript from the hearing before the state court that would indicate that the parties intended the repair of the vehicle to serve as additional support for the Creditor.[5] Accordingly, the Court concludes that no questions of fact remain as to this issue.

Having considered the facts established above, the Court concludes that the parties intended the Debtor's obligation to repair the Creditor's vehicle simply as a means of ensuring that the property being awarded to the Creditor would be returned to her with a higher fair market value than otherwise. Therefore, the Court finds that any debt owed for the Debtor's failure to return the vehicle in "good running condition" is not "in the nature of support" within the meaning of § 523(a)(5).[6]

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[5] According to the transcript of the hearing before the state court, the parties specifically stated that the obligation to assume the credit card debt and the note would be considered support to the Creditor, but no mention of support was made when the parties addressed the Debtor's obligation to repair the Creditor's vehicle. *See* Transcript of Hearing Before the Hon. Timothy R. Hamil, Superior Court for the County of Gwinnett, May 20, 2003, at 6.

[6] This finding does not foreclose the possibility that this obligation could, nonetheless, be nondischargeable under § 523(a)(15). As discussed above, the Court has deferred its ruling as to whether the other divorce-related obligations are nondischargeable under§ 523(a)(15). Because the Court will need to consider similar facts with regard to all of these obligations and their dischargeability under § 523(a)(15), the Court finds that it

CONCLUSION

Having given this matter its careful consideration, the Court concludes that material questions of fact remain as to whether the divorce-related obligations at issue are nondischargeable under §§ 523(a)(5) or (a)(15). Accordingly, the Debtor's Motion for Summary Judgment is hereby **DENIED**.

The parties shall prepare and submit a proposed consolidated pre-trial order on or before **March 25, 2005** and shall appear before the Court for a pre-trial conference on **April 11, 2005 at 2:00p.m.** in Chambers, Room 1471, Richard Russell Building, 75 Spring Street, Atlanta, Georgia.

IT IS SO ORDERED.

At Atlanta, Georgia, this _____ day of February, 2005.

_____
W. HOMER DRAKE, JR.
UNITED STATES BANKRUPTCY JUDGE

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would be more efficient to defer its ruling on the issue of whether the Debtor's obligation to repair the Creditor's vehicle is nondischargeable under § 523(a)(15) until a trial has been held.